No. 89-61

# In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

*v.*

FILIBERTO OJEDA RIOS, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES

# In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-61

UNITED STATES OF AMERICA, PETITIONER

*v.*

FILIBERTO OJEDA RIOS, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

1. Respondents contend (Br. 10) that under 18 U.S.C. 2518(8)(a), "immediate judicial sealing, or a satisfactory explanation for delay" is a prerequisite to the admission of tape-recorded conversations. But that is not the language Congress used in the statute. Instead of predicating the admissibility of taped conversations on "*immediate* judicial sealing, or a satisfactory explanation for *delay*," the statute predicates admissibility on "[t]he *presence* of a seal provided for by this subsection, or a satisfactory explanation for the *absence* thereof." 18 U.S.C. 2518(8)(a) (emphasis added). The operative sentence makes no reference to immediacy or delay; instead, according to the words chosen by Congress, admissibility turns solely on the "presence" or "absence" of the seal.

Respondents argue that the "absence" of the "seal provided for by this subsection" does not mean simply the absence of a judicial seal; according to respondents, a seal is "absent" for purposes of Section 2518(8)(a) if the seal is present but the sealing was delayed. That construction of the statutory language is, at minimum, quite strained. By its natural reading, the phrase "the presence of a seal provided for by this subsection" means simply the presence of the judicial seal referred to earlier in the statute, without regard to when that seal was affixed.

Respondents argue that Congress could not have meant to prohibit the admission of tapes when there is an unexplained absence of a seal, while not prohibiting the admission of tapes when the sealing is delayed. But there is nothing illogical about distinguishing between delayed sealing and the absence of a seal. While the legislative history is unenlightening on this point,[1] Congress may well have considered that cases in which the seal is absent without explanation raise sufficiently grave concerns about authenticity that there should be a special statutory provision

[1] The legislative history does not reveal much about the purpose Congress wanted the exclusionary provision in Section 2518(8)(a) to serve. The provision was first proposed, without comment, by a law professor during hearings on the Omnibus Crime Control and Safe Streets Act. *Anti-Crime Program: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 1041 (1967). It was picked up, again without comment, in S. 2050, Senator Hruska's bill on electronic surveillance. *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 1007 (1967). The provision was then included, almost unchanged, in the bill that was reported and enacted. Although the Senate report contains a useful discussion of the purposes of the sealing requirement, it contains only an unenlightening one-sentence paraphrase of the portion of Section 2518(8)(a) at issue here. See S. Rep. No. 1097, 90th Cong., 2d Sess. 104 (1968).



barring the admission of tapes in those instances. In other cases, such as those involving only a delay in sealing, Congress may have concluded that the risk of tampering was not as great, and that no special statutory rule was called for. In those cases, the issue of authenticity could adequately be addressed by traditional evidentiary rules of authentication. In short, there is nothing about the purpose of the statute that compels the Court to read the word "absence" as if it were the word "delay."[2]

2. Respondents contend (Br. 8 n.4) that we are precluded from relying on the plain language of Section 2518(8)(a) in this Court because we did not rely on the plain language of the statute below. In the court of appeals, we argued (Gov't C.A. Br. 38-48) that Section 2518(8)(a) does not require suppression of tape-recorded evidence as long as the tapes' integrity has been maintained. That is precisely the argument we are making here. In support of that argument, we are contending that suppression is not appropriate merely because of delays in sealing, an argument we also made in the court of appeals. The only legal point that we are making now but did not make in the court of appeals—that the plain language of Section 2518(8)(a) supports our

[2] Respondents argue (Br. 13) that our construction of the statute would permit the government to avoid the exclusion of unsealed tapes simply by having a court seal them the day before the trial. A court, however, is not obligated to seal tapes any time the government presents them for sealing, regardless of the circumstances. A court presented with unsealed tapes the day before trial might well refuse to seal them on the ground that the sealing would achieve nothing and that the circumstances of their remaining unsealed for a long time were too suspicious to ignore. A court's refusal to seal tapes under those circumstances would require the government to provide a satisfactory explanation for the absence of the seal when the government presented the tapes for admission into evidence.

construction of the statute—is one that was not open to us in that court.[3]

We believe that the plain language of the statute provides additional support for the argument we have made throughout this case, and that the "plain meaning" point is not a separate argument subject to waiver if not made below. But even if the plain meaning point should have been formally preserved in the court of appeals notwithstanding the settled law of that circuit, this Court may properly consider it, for two reasons. First, the court of appeals specifically addressed the plain meaning point and reaffirmed its earlier decisions rejecting it. See Pet. App. 6a.[4] Second, the question whether Section 2518(8)(a) authorizes exclusion of tapes because of sealing delays is inextricably intertwined with the question whether suppression should be ordered for sealing delays that are not explained to a court's satisfaction. It is impossible to make a sensible determination whether suppression should be ordered for sealing delays that are not satisfactorily explained, without

[3] The court of appeals had consistently rejected the "plain meaning" argument in prior cases. See *United States* v. *Rodriguez*, 786 F.2d 472, 476 (2d Cir. 1986); *United States* v. *Massino*, 784 F.2d 153, 156 (2d Cir. 1986); *United States* v. *Vazquez*, 605 F.2d 1269, 1274 (2d Cir.), cert. denied, 444 U.S. 981 (1979); *United States* v. *Gigante*, 538 F.2d 502, 506 (2d Cir. 1976).

[4] This Court has held that where issues "are neither raised before *nor considered by* the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (emphasis added). See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Husty* v. *United States*, 282 U.S. 694, 701-702 (1931); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). As that formulation suggests, if the lower court addressed and resolved the issue, it is properly before this Court even if the issue was not raised below by one of the parties. *On Lee* v. *United States*, 343 U.S. 747, 749-750 n.3 (1952); see *Moragne* v. *States Marine Lines*, 398 U.S. 375, 378-379 n.1 (1970); *Thomas* v. *Arn*, 474 U.S. 140, 157-158 (1985) (Stevens, J., dissenting).



asking the preliminary question whether the statute authorizes suppression of tapes for sealing delays in *any* circumstances.[5]

3. Even if respondents are correct in their contention that Section 2518(8)(a) requires a "satisfactory explanation" for sealing delays, there is no support in the text of the statute or its legislative history for their proposed definition of that term. Respondents argue (Br. 29-30) that the admissibility of late-sealed tapes must turn on the "totality of the circumstances," including "the duration of the delay; the diligence of law enforcement in completing the pre-sealing tasks; the frequency (in a case involving multiple wiretap orders) of violations of the immediate sealing requirement; the nature of the circumstances, if any, which diverted those responsible from the presentation of the tapes for immediate sealing; evidence of any prejudice caused to defendants by the delay in sealing; and evidence of any bad faith by the government." Many of those factors, however, bear no relationship to the purpose to be served by the sealing requirement—ensuring "that accurate records will be kept of intercepted communications." S. Rep. No. 1097, 90th Cong., 2d Sess. 104 (1968).[6] In the absence of any other guidance from Congress, the term "satisfactory explanation" must be defined with reference to that purpose. Accordingly, a "satisfactory explanation" is one that satisfies the court that the delay in sealing did not result in any alteration of the tapes. [7]

[5] This Court has held that an argument not made below must be addressed where "resolution of this issue of law is a 'predicate to an intelligent resolution' of the question on which [the Court] granted certiorari." *Cuyler* v. *Sullivan*, 446 U.S. 335, 342-343 n.6 (1980). See *United States* v. *Mendenhall*, 446 U.S. 544, 551 n.5 (1980).

[6] They may, however, be relevant to determining the appropriateness of contempt sanctions under Section 2518(8)(c).

[7] Respondents err in stating that, under our definition, the deliberateness or bad faith of the supervising attorney is irrelevant. To

Respondents contend (Br. 20-28) that judicial sealing is an extremely important protection against tape tampering, and that the provision in Section 2518(8)(a) that authorizes the exclusion of unsealed tapes should be interpreted as a prophylactic rule designed to avoid the need for inquiry into whether tapes are pristine in particular cases. There are several problems with this argument.

First, while judicial sealing may provide some marginal protection against the risk of tampering, the protection is not complete, nor even very substantial. Since sealing is not required until the end of a period of electronic surveillance and all extensions of that period, weeks or even months may pass between the date particular conversations are intercepted and the date of timely judicial sealing. A government agent or prosecutor bent on tampering with tapes would therefore typically have a lengthy period within which to do so before the obligation to seal matures. Moreover, "sealing" typically consists simply of placing evidence tape over boxes of tapes and returning the tapes to the investigative agency for safekeeping.[8] To any agent or prosecutor bent on committing the crime of obstructing justice by tampering with tape-recorded evidence, the presence of a strip of evidence tape is not likely to be a significant obstacle. Because the protection provided by the sealing mechanism is modest at best, it is unlikely that Congress regarded sealing as so critical to the preservation of tape-

---

the contrary, the fact that an attorney deliberately or in bad faith delayed sealing in order to provide an opportunity to alter tapes is obviously highly relevant to the question whether the tapes were in fact altered and would make the government's burden of establishing the tapes' authenticity much harder to meet. There is, of course, no suggestion in the record that the supervising attorney in this case was so motivated.

[8] The legislative history of Section 2518(8)(a) makes clear that the law enforcement agency – not the court – will ordinarily be the custodian of tape-recorded materials, even after the court seals the tapes. See S. Rep. No. 1097, *supra*.



recorded evidence as to warrant the creation of a "prophylactic rule" that would result in the suppression of evidence in cases of delay, even when the tapes could be shown to be unaltered.

Second, because Congress permitted the admission of unsealed tapes upon a "satisfactory explanation" for the omission, the rule Congress created is not a "prophylactic rule" in any event. The rule does not require exclusion of tapes in the absence of immediate sealing if the failure to comply with the statutory sealing requirement can be explained. The presence of such a broad exception to the rule of exclusion undermines respondents' argument that Congress was so concerned with the risk of tampering, and so confident of the capacity of the judicial seal to prevent tampering, that it wished to enforce compliance with the sealing requirement by requiring the suppression of tape-recorded evidence whenever there was a delay in sealing. Instead, the "satisfactory explanation" proviso supports the view that Congress regarded the presence of a seal (or an explanation for its absence) as simply a prerequisite for admission of tape-recorded evidence, one that would exclude tape-recorded evidence only in the most extreme cases, where the risk of actual tampering was deemed to be intolerably high.[9]

---

[9] Respondents argue (Br. 19-20) that our construction of Section 2518(8)(a) is flawed because it would simply convert the rule requiring the presence of a seal (or a satisfactory explanation for its absence) into a bar to unauthenticated evidence that would already be subject to exclusion under Fed. R. Evid. 901. Respondents have overlooked the fact that the evidentiary bar in Section 2518(8)(a) is much broader than the bar erected by Rule 901. Under Section 2518(8)(a), if tapes are unsealed and there is no satisfactory explanation for their condition, the consequence is not merely to exclude the tapes themselves, but also to exclude any "evidence derived therefrom." That is a much broader principle of exclusion than the one found in Rule 901, which excludes only the unauthenticated evidence itself.

As part of their "prophylactic rule" argument, respondents contend that the admissibility of electronic surveillance evidence should not depend on the integrity of the tapes, because it is difficult to determine whether tapes have been altered. But in most cases in which sealing delays occur, the government will satisfy its burden of showing that the tapes are authentic by establishing an unbroken chain of custody. Ordinarily, expert testimony will not be necessary to establish tape authenticity.[10]

In those cases in which expert testimony is admitted, it can be quite helpful in determining authenticity. In this case, for example, the government offered an expert in tape authenticity to rebut respondents' allegations of tape tampering. Pet. App. 51a-52a. The government's expert performed several tests on a sample of ten sealed original tapes selected by respondents from the 166 tapes designated by the government as relevant. Presumably, respondents selected those ten tapes because they regarded them as the most suspect of the entire lot. See Pet. App. 55a. Yet, the government expert concluded that nine of the ten tapes are original recordings. Pet. App. 52a. With respect to the tenth tape, the expert testified that it contained insufficient data from which he could render an opinion. *Ibid.* The district court credited the expert's testimony and found that "the subject tapes are originals." Pet. App. 53a-55a. Accordingly, there is nothing in this record that supports respondents' claim that tape authenticity is impossible to determine.

4. Respondents allege (Br. 34) that the delays in sealing the Levittown tapes and the Vega Baja public telephone tapes recorded pursuant to the January 18, 1985, order were

[10] Unable to impeach the government's chain-of-custody evidence in this case (see Pet. App. 30a-45a), respondents presented expert testimony on the subject of tape authenticity. Only then, in rebuttal, did the government present the testimony of its expert.



the result of Justice Department attorney Frank Bove's "deliberate decision to ignore the law." The record, however, does not support that assertion. The district court found that "nothing in the record indicates that Bove intentionally ignored the applicable law or deliberately failed to seal the tapes. Rather, [Bove] believed his interpretation was within the law and no evidence is on the record that even suggests that he purposefully flouted the requirement or failed to carry out his duties." Pet. App. 78a. The court of appeals, while critical of what it considered a serious legal error on Bove's part, did not reject the district court's finding on this point or in any other way suggest that Bove's error was deliberate. See Pet. App. 12a.[11]

Respondents charge (Br. 35) that we have mischaracterized Bove's explanation of why he did not have the Levittown tapes sealed as soon as surveillance at that location ceased. To the contrary, our characterization of Bove's position was entirely fair. Nonetheless, because respondents seek to make much of Bove's explanation for his sealing decisions, we shall address the matter in some detail.

Bove stated that he believed he was required to seal the tapes "when there occurred a meaningful hiatus in our authority to intercept communications," J.A. 4-5. He explained that he reached that conclusion because "the targets of this investigation changed residences and vehicles so frequently, we considered the interceptions at various locations to be interrelated and part of the same investigation." J.A. 4; see Pet. App. 77a; Oct. 27, 1987, Tr. 129-130.

[11] Bove testified that although he was a novice in electronic surveillance when he was assigned to this investigation, he prepared himself for his task by reading the statute, a number of court decisions, and several secondary sources. J.A. 23-24; Oct. 27, 1987, Tr. 112-113, 167. Bove derived his conclusion as to when sealing was required from the text of the statute itself. Oct. 27, 1987, Tr. 177; Oct. 28, 1987, Tr. 49.

From the outset in April 1984, the principal target of the Levittown interception orders was respondent Filiberto Ojeda Rios (Ojeda). Oct. 27, 1987, Tr. 122, 124, 129. During that period, the government also obtained a series of interception orders for Ojeda's automobile, a Datsun Sentra. Pet. App. 20a. When Ojeda moved from Levittown to El Cortijo in July 1984, the government sought a new interception order for his new residence in El Cortijo. Oct. 27, 1987, Tr. 122-124. The El Cortijo interception order was extended until September 25, 1984, and the Datsun Sentra interception orders were extended until October 10, 1984. The El Cortijo, Datsun Sentra, and Levittown tapes were all sealed on October 13, 1984. Pet. App. 96a.

Bove explained that he regarded the El Cortijo interception orders as extensions of the Levittown interception orders, because El Cortijo was simply Ojeda's new residence. J.A. 26 ("To us[,] the only reason we went in and sought authority to intercept conversations at El Cortijo * * * was because that was the latest address where we felt that Ojeda was living. The only reason we switched from Levittown was because his residence, in effect, switched."); Oct. 28, 1987, Tr. 16 ("I viewed it as an interrelated investigation * * * the El Cortijo application [was] really just a continuation and an extension of our authority to intercept Mr. Ojeda's residence. It was a continuation in that respect."); *id.* at 62 ("we viewed the move by Mr. Ojeda from one location to another as simply a continual attempt to monitor his residence."); see also J.A. 40-41; Oct. 28, 1987, Tr. 63, 79, 80, 83-84.

Bove further concluded that the sealing requirement did not mature until the last interception order for the Datsun Sentra expired on October 10, 1984, because that was the last outstanding interception order directed at Ojeda. Oct. 27, 1987, Tr. 129. Thus, it was not until the authorities "lost track of Mr. Ojeda" in early October 1984 that Bove



concluded he was required to seek judicial sealing for the Levittown tapes. Oct. 27, 1987, Tr. 124; Oct. 28, 1987, Tr. 15. Until then, Bove considered the various surveillance orders directed at Ojeda to be "part of one continuous, full, extension of an ongoing investigation." Oct. 27, 1987, Tr. 194.

The district court made the same point during the course of the suppression hearing. During Bove's testimony, the court summarized Bove's position as follows (J.A. 26):

> THE COURT: As I understand it, your application of the statute, as you saw it, was that it was applicable to the target subject, so to speak, as long as there was a continuous order against him rather than the location being the target where the authorization originally stemmed from?
>
> THE WITNESS: That's the way I viewed it, your Honor.

Respondents contend that the Levittown tapes should be excluded because Bove acted unreasonably in drawing the legal conclusion that the El Cortijo surveillance orders could be regarded as extensions of the Levittown surveillance orders and that the obligation to seal the Levittown tapes therefore did not mature upon the expiration of the last order authorizing surveillance at that location. As we discussed in our opening brief, however, the Second Circuit's own prior decision in *United States* v. *Principie*, 531 F.2d 1132, 1142 & n.14 (1976), cert. denied, 430 U.S. 905 (1977), was consistent with that conclusion, since the *Principie* court held that the term "extension" can embrace an order authorizing surveillance in a new location to which a target has moved. Thus, in that respect at least, Bove's construction of the statute was in accordance with the Second Circuit's own rule at the time. His conclusion that he did not have to seal the Levittown tapes when Ojeda and the

surveillance moved to El Cortijo was therefore reasonable, even if it was not correct.[12]

Likewise, with respect to the Vega Baja public telephone tapes, Bove did not believe that the hiatus between the expiration of the first order on February 17, 1985, and the issuance of the extension of that order on March 1, 1985, triggered the sealing requirement for the first group of tapes. Oct. 27, 1987, Tr. 180. Respondents do not even attempt to attribute any bad faith to the government for this 12-day hiatus. Instead, they argue that Bove's explanation was "deficient" because the Department of Justice's Office of Enforcement Operations was unable to complete its revision of the underlying affidavit within the 12-day period.[13] Significantly, they do not address the Second Circuit's decision in *United States* v. *Scafidi*, 564 F.2d 633, 637, 641 (1977), cert. denied, 436 U.S. 903 (1978), which countenanced a 23-day hiatus between the original application and an extension.

---

[12] Respondents are incorrect in stating (Br. 35 n.20), that we have conceded that the El Cortijo surveillance order was not an "extension" of the Levittown order. We made no such concession; instead, we simply did not seek review on that issue, and we have accordingly accepted "for the sake of argument" the district court's calculations of the sealing delays. Gov't Br. 26 n.18.

[13] Respondents make much of the fact that Bove stated that the 12-day delay was necessary to rewrite the electronic surveillance affidavit, but that the affidavit submitted on March 1, 1985, was not substantially different from the one submitted on January 18, 1985. In fact, Bove's explanation was accurate. As we explained in our opening brief, the filing of an extension application was delayed while attorneys in Washington worked on a revised affidavit, but when it became clear that the revision was taking too much time, the decision was made to use the prior affidavit as the basis for the March 1, 1985, extension application. The substantially revised affidavit was presented a month later, in support of the March 31, 1985, extension application.



There is nothing in the statute that requires that extensions be sought without any period of interruption in surveillance. Certainly, the requirement that evidence be excluded in the absence of a seal or a satisfactory explanation for its absence cannot be stretched to require exclusion where the only "flaw" in the proceedings is that the extension order did not follow immediately upon the termination of the original surveillance order. Moreover, in light of the *Scafidi* decision, which held that an extension order was still an extension order even after a hiatus longer than the one in this case, it is very difficult to understand how the court of appeals could regard Bove's legal conclusion on this issue as unreasonable.

5. At the end of their brief, respondents assert that the government was guilty of "widespread overreaching during its electronic surveillance investigation, including use of a secret recording system and intentional violations of Title III and court orders." Br. 40. Those allegations were rejected by the district court and were not addressed by the court of appeals. Respondents appear to recognize that those allegations are not before this Court for decision, but they nonetheless refer to them, apparently in an effort to persuade the Court that the investigation in this case "demonstrate[d] a contempt for the rule of law." Resp. Br. 40.

Respondents' allegations are wholly without merit. First, respondents contend (Br. 41-46) that the monitoring agents acted unlawfully because they not only recorded the intercepted conversations on reel-to-reel tapes, which were preserved for use as evidence, but also simultaneously recorded the conversations on cassette tapes. As the district court found, the agents used the cassette tapes to help them prepare contemporaneous written summaries of the intercepted conversations. When a summary was completed, the tapes were ordinarily reused. 695 F. Supp. 1369,

1371-1373. The district court held that this practice was entirely lawful, that the agents did not knowingly record conversations on the cassette tapes that were not simultaneously recorded on the original tapes, that the government did not have a duty to preserve those tapes, and that respondents were not prejudiced by the erasure and reuse of the tapes.[14] 695 F. Supp. at 1373-1378. Respondents cite no authority for their claim that the practice of making a second recording of recorded conversations was unlawful.

Respondents next claim (Br. 46-47) that the government solicited false affidavits from the monitoring agents to submit in response to respondents' suppression motions. Again, the record refutes that claim. The case agent advised the monitoring agents of respondents' allegations of illegality in the course of the investigation and asked the agents to sign a prepared affidavit responding to those allegations if they agreed that the affidavit was correct. The monitoring agents were specifically directed *not* to sign the affidavit if they believed it to be in any way inaccurate.[15]

---

[14] Thirty-nine of the cassettes were preserved. Four of those 39 tapes contained a few minutes of conversations that were not recorded on the original reel-to-reel tapes. 695 F. Supp. at 1378. The district court found, however, that the amount of information that was recorded on the cassette tapes but not on the original reel-to-reel tapes was de minimis, *id.* at 1377, 1378, that the monitoring agents believed in good faith that everything recorded on the cassette tapes was also recorded on the reel-to-reel tapes, *id.* at 1373, 1376, 1377-1378, and that the loss of evidence resulting from the erasure of some of the work cassettes was inadvertent and not prejudicial to the defendants, *id.* at 1377-1378.

[15] The monitoring agents were directed to "sign the [draft] affidavit before a notary only if [you] completely agree with everything in the affidavit." Any agent who "for any reason * * * can not agree with any portion of the affidavit" was directed to contact a specified member of the prosecution team. Telegram to Director, FBI, from SAC, New Haven, dated Oct. 20, 1986. Defendants' Pretrial Exh. 2385.



Finally, respondents assert (Br. 47-48) that the monitoring agents listened to conversations without recording them. After hearing the testimony of 25 monitoring agents, the court found no basis in the record for respondents' allegation that the agents regularly engaged in such a practice. 695 F. Supp. 1379, 1380, 1384, 1393. Indeed, the court found that only two of the 64 monitoring agents ever deliberately engaged in live monitoring without recording. *Id.* at 1393, 1394. Because the Vega Baja public telephone orders authorized the agents to record only the conversations of targets of the investigation who used the phone booths, those two agents occasionally listened briefly to a call to determine, where visual observation was inadequate, whether the caller was one of the targets. Once the agent determined by voice identification that a non-target had placed the call, he would discontinue the monitoring. Significantly, the court found that all the conversations to which respondents were parties were recorded, and that respondents were therefore not prejudiced by the occasional failure to record the conversation of a non-target. 695 F. Supp. at 1394-1395.[16] Section 2518(8)(a) of Title 18 requires that intercepted conversations shall be recorded "if possible." That provision was intended to assure that the "best evidence" of the intercepted conversations would be available at trial; it was not intended to protect the targets' Fourth Amendment privacy interests. Accordingly, the few instances of listening without recording, which the district court referred to as "de minimis" (695 F. Supp. at 1396), do not affect the admissibility of any of the conversations,

---

[16] The court found that there were only two instances other than those involving the two agents surveilling the Vega Baja public telephones in which listening without recording had occurred: once as the result of a power failure in the recording equipment, and once when an agent overheard a small portion of a conversation on the receiving unit in his surveillance vehicle but did not have a recording device in his possession. 695 F. Supp. at 1386.

and certainly not the lawfully intercepted, taped conversations to which respondents were parties. See *United States* v. *Clerkley*, 556 F.2d 709, 718-719 (4th Cir. 1977), cert. denied, 436 U.S. 930 (1978); *United States* v. *Daly*, 535 F.2d 434, 442 (8th Cir. 1976); see generally *United States* v. *Donovan*, 429 U.S. 413, 434 (1977).[17]

In short, respondents exhaustively examined 25 agents during the suppression hearing but were unable to show any pattern of unlawful conduct during the investigation. As the district court found, the most they were able to show was an occasional inadvertent error in the monitoring process that did not in any way prejudice respondents.

6. Amici Asian-American Legal Defense Fund, et al. argue that electronic surveillance is illegal in Puerto Rico because it is prohibited by the Puerto Rico Bill of Rights. See P.R. Const. Art. II, § 10 ("Wire-tapping is prohibited. * * * Evidence obtained in violation of this section shall be inadmissible in the courts."). Respondents sought suppression on this ground in the district court, and the district court rejected their claim. 649 F. Supp. 1183. They raised the same issue in a civil suit, and the claim was rejected there by the First Circuit. *Camacho* v. *Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 487-488 (1989). Respondents have not raised the issue in this Court, however, and it is therefore not presented for decision.

In any case, there is no merit to this claim. Amici do not dispute that Congress intended the federal wiretapping statute to displace conflicting state and local laws pertaining to wiretapping (*Camacho*, 868 F.2d at 487) so that evidence obtained by federal officers in compliance with the federal statute would be admissible in federal court, whether

---

[17] Nor did the government attempt to conceal from respondents the existence of any work cassettes or the occasional instances of listening without recording. See 695 F. Supp. at 1373-1375.



or not that evidence would have been admissible in state court proceedings. 18 U.S.C. 2517(3); *United States* v. *Quinones*, 758 F.2d 40, 43 (1st Cir. 1985); *United States* v. *Adams*, 694 F.2d 200, 201 (9th Cir. 1982), cert. denied, 462 U.S. 1118 (1983); *United States* v. *Horton*, 601 F.2d 319, 323 (7th Cir.), cert. denied, 444 U.S. 937 (1979); *United States* v. *Hall*, 543 F.2d 1229 (9th Cir. 1976) (en banc), cert. denied, 429 U.S. 1075 (1977); *United States* v. *Armocida*, 515 F.2d 49, 52 (3d Cir.), cert. denied, 423 U.S. 858 (1975). Section 2510(3) of Title 18 defines "State" to include Puerto Rico. Consequently, the intercepted conversations are not subject to suppression on the ground that electronic surveillance is not authorized by the laws of Puerto Rico.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

FEBRUARY 1990

U.S. GOVERNMENT PRINTING OFFICE 1990—262 203/00761